No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-890

JOHN HESLER and JOHN SELZER,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

JULIUS LUCIUS ECHELES
CAROLYN JAFFE
35 East Wacker Drive
Chicago, Illinois 60601
Attorneys for Petitioners.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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Petitioners, John Hesler and John Selzer, respectfully pray that a writ of certiorari be issued to the Appellate Court of Illinois, Second District, to review its decision affirming judgments of conviction in The Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, adjudging them guilty of unlawful delivery (both petitioners) and unlawful possession (petitioner Selzer only) of more than 500 grams of cannabis.

Judgments and Opinions Below

On March 31, 1976, the Illinois Appellate Court, Second District, filed its opinion affirming petitioners' convictions, Nos. 75-111 & 74-431 (consolidated), reported at 39 Ill. App.3d 843, 350 N.E.2d 748 (1976). A copy of the Appellate Court's opinion is attached hereto as Appendix A. That court denied a timely petition for rehearing and again affirmed, per a "Supplemental Opinion on Denial of Rehearing," filed on July 22, 1976, reported at 39 Ill.App. 3d 843, 350 N.E.2d 748 at 753 (1976) (attached as App. B hereto). A petition for leave to appeal to the Illinois Supreme Court, timely filed, No. 48783, was denied on September 29, 1976. (App. C)

Jurisdiction of This Court

The judgment sought to be reviewed was entered on September 29, 1976. This petition for a writ of certiorari is filed within 90 days from denial of the petition for leave to appeal. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule 22 of the Rules of this Court.

Questions Presented for Review

1. Were petitioners deprived of their constitutional right to effective assistance of counsel, where, *inter alia,* trial counsel was precluded from raising the defense of entrapment by his failure to have responded to the State's discovery motion pursuant to State procedural rules, and said same trial counsel, who was also initial counsel on the direct appeal, failed to raise and preserve on appeal the errors involved in failure to raise the defense of entrapment or to request instructions thereon?

A. Should this Court grant Certiorari in order to re-examine the minimum due process standards applicable to determining the minimum caliber of professional legal representation which the Constitution requires the States to assure defendants in criminal trials?

B. Is not the question whether a federal constitutional right was waived itself a federal question, such that this Court must look beyond the conclusions of the State Appellate Court that certain such issues were waived for failure to be raised below or on the initial direct appeal? Alternatively, if such ordinarily would constitute waiver, can this doctrine constitutionally be applied in the face of serious and substantial allegations attacking the competency and effectiveness of counsel, where the grounds for attacking counsel's competency include his failure to have taken various appropriate actions before and at trial, and the alleged waiver of numerous issues on appeal (per the appellate court) is due to that same counsel's failure to raise on appeal issues which he did not choose to raise or was precluded by the court from raising below because of such counsel's lapses in certain procedural requirements?

2. Were petitioners denied meaningful appellate review and due process of law, where the appellate court refused to consider, on the petition for rehearing prepared by counsel different from petitioner's trial and original appellate counsel, all points not raised below or on the original direct appeal, even though new counsel on rehearing argued that former counsel, in failing so to do, was thereby ineffective, depriving petitioners of their constitutional right to effective assistance of counsel?

3. Does the doctrine set forth by this Court in *Hampton* v. *United States,* ..... U.S. ....., 48 L.Ed.2d 113 (1976), preclude a finding of entrapment as a matter of law in all

situations where a government agent supplied the contraband, subject of petitioners' convictions, or was the holding in that case based upon a combination of that factor plus a showing of predisposition of defendants to commit such offenses? Should certiorari be allowed to clarify the extent to which *Hampton* modifies existing law on the defense of entrapment?

4. May the defense of entrapment be raised as an alternative to the defense of no guilty scienter, and does State decisional law precluding same deprive petitioners of their right to present a meaningful defense, in violation of due process of law?

Constitutional Provisions and Statutes Involved

The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

> "Section 1. . . . [N]or shall any State deprive any person of . . . liberty . . . without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Illinois Supreme Court Rule 413, Chap. 110A, Ill. Rev. Stat. 1975, provides in pertinent part:

> "(d) **Defenses.** Subject to constitutional limitations . . . defense counsel shall inform the State of any defenses which he intends to make. . . ."

Illinois Supreme Court Rule 415, Chap. 110A, Ill. Rev. Stat. 1975, provides in pertinent part:

> "(g) **Sanctions.**

> "(i) If . . . a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may . . . exclude such evidence, or enter such other order as it deems just under the circumstances."

Raising the Federal Questions Below

The issue as to the alleged incompetency of counsel at trial and on the original direct appeal was raised for the first time when present counsel was retained to pursue a Petition for Rehearing in the Illinois Appellate Court; however, as is evident from perusal of that court's Supplemental Opinion upon Denial of Rehearing, (App. B), the court did not rule on the merits of said claim. Said issue, with all its ramifications (including raising the various other omissions of original counsel at trial and on the initial appeal, to demonstrate that such assistance was not "effective" in the constitutional sense) was also presented to the Illinois Supreme Court on the petition for leave to appeal, which was denied. (App. C.)

The question as to the extent (if any) to which this Court's decision in *Hampton* v. *United States*, ... U.S. ....., 48 L.Ed.2d 113 (1976), alters existing law concerning entrapment was first raised on rehearing, as the appellate court in its initial opinion had deemed the issue waived; but both on rehearing in the appellate court and on petition for leave to appeal to the Illinois Supreme Court, present counsel argued that ineffective counsel rendered waiver impossible, urging the merits of the entrapment defense (despite *Hampton*) to demonstrate that failure properly to have raised and preserved the issue was indeed prejudicial. The appellate court avoided the issue, and the Supreme Court denied leave to appeal.

STATEMENT OF THE CASE

Prior to trial, the trial court ruled petitioners could not present the affirmative defense of entrapment, because defense counsel had failed to comply with Supreme Court Rule 413, *i.e.*, failed to assert what defenses he would present. (Tr. 123)[1] Petitioners, however, by their testimony, presented evidence that they were solicited by Rich Roman (a government agent) to aid him *prior* to their knowing that marijuana was involved; and, when advised, were told that they must continue to aid him, because the persons they met [who were in fact agents] were armed, dangerous and would cause trouble if anything went wrong. (Tr. 332, 375) Petitioners also asserted that the marijuana belonged to Rich Roman.

The prosecution presented no evidence that either petitioner had a prior disposition to deal in, or even to possess, marijuana.

Aside from the officer's testimony containing hearsay as to what Roman (who did not testify) said, all evidence presented showed that Roman, a government agent: (1) provided the controlled substance, and (2) solicited petitioners' participation.

The defense lawyer failed to request an entrapment instruction. The court gave none.

On appeal, petitioners first were represented by the same lawyer as at trial. The court affirmed, asserting, *inter alia*, that petitioners could not raise entrapment on appeal since it was not raised below. (App. A, p. App. 3)

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[1] "Tr." refers to the Transcript of Proceedings below; and "A." to petitioners' Abstract filed in the Appellate Court.

On petition for rehearing—represented by different (present) counsel—petitioners asserted: (a) that since they presented evidence of entrapment, and argued entrapment, the issue was not waived; (b) that prior counsel rendered ineffective assistance both at trial and on appeal; and (c) petitioners were denied a fair trial. The Appellate Court again affirmed, writing a supplemental opinion which held that since petitioners did not use the term "entrapment," said defense cannot be raised on appeal. (App. B, pp. App. 9-10) The court refused to consider the other issues raised on rehearing. (App. B)

Statement of Facts

Rich Roman was an informant, who was trying to obtain a benefit for himself by arranging the arrest of some other person. (Tr. 309-10, A. 25)

On March 15, 1974, Roman met with two Lake County Deputy Sheriffs, undercover agents, Willie R. Smith and Richard Whitmore at a parking lot. The State presented evidence of the officers to show that upon arriving at the parking lot, petitioner John Selzer was in the car belonging to Roman. Petitioner Hesler was in a second car with Joe Gray; Roman exited his car, walked up to the undercover agents and then returned to his car. Petitioner Selzer and Roman then returned to the agents' car. Petitioner Selzer was shown some money. Petitioner Selzer just looked at the money. He did not count it. (Tr. 139) He then left the car. Roman's car drove away. During the time the car was gone, Hesler was in the officers' car and counted money. Roman then returned in his car with defendant Selzer. Roman had in the trunk of *his car*, for which only he had the key, 50 pounds of marijuana. (Tr. 196-97, A. 19) He had arranged the purchase price earlier

that day with the agents. (Tr. 180, A. 18) The officers then walked to Roman's car. At this time petitioners were not in Roman's car. Roman opened the trunk and the agents took out the marijuana from the trunk of Roman's car. The agents arrested petitioners and also Roman and Gray. Roman and Gray were released the next day.

Hesler testified that he first met Joe Gray by chance in a tavern two days before the purchase and that Gray had suggested he might make $50.00 by accompanying Gray's friend, Rich Roman, who was "to collect a lot of money and . . . thought there might be some trouble"; it was agreed that Hesler's roommate, Selzer, ". . . could come along." (Tr. 309-31, A. 25-26) He did not know that marijuana was involved.

On the night of the purchase, Hesler testified he and Selzer drove in the latter's car to the Dog 'N Suds where they met Roman and Gray. Roman took over control, instructing Hesler to accompany Gray in Selzer's car and took Selzer with him in Roman's own vehicle to the place of purchase. (Tr. 325-31, A. 26) When Hesler and Selzer were alone, Selzer informed Hesler that the meeting was a marijuana sale and that Roman and Gray had guns; that they must cooperate or "there was going to be a lot of trouble." (Tr. 325-40, A. 26-27)

Hesler did cooperate because of the threat; he told the police officers he could get more marijuana, and "told them anything they wanted to hear." He did this because "I was scared to death and I just didn't want to get hurt." (A. 27)

Selzer corroborated Hesler. He also testified that Roman told him on the drive to the parking lot that "there was going to be a marijuana sale," and that when he communicated this to Hesler, he rejected the matter, saying, "no way." (A. 28) Selzer also testified he did what Roman told him to because he did not know how to get out of it and he was scared. (Tr. 375)

The State presented absolutely no evidence that either petitioner was predisposed to possess or to sell cannabis.

Petitioner Hesler was sentenced to 1 to 4 years, and petitioner Selzer to 3 to 15 years.

REASONS FOR GRANTING THE WRIT

Introduction

Whether or not the defense of entrapment involves due process consideration: if believed by the fact finder, it would be a complete defense, but could not be considered due to lapses by trial and original appellate counsel. Thus petitioners' inability to have the jury consider this defense, which otherwise would have been available, raises serious questions of constitutional proportion.

Because the most grievous loss to petitioners at bar due to ineffective counsel was the loss of the right to assert the defense of entrapment, it becomes necessary to demonstrate that such defense would have availed them, had it properly been raised and preserved. For this reason, availability of this defense must be considered, even though constitutional questions as such may not be directly involved in such defense.

1.

Petitioners were deprived of their constitutional right to effective assistance of counsel where, inter alia, trial counsel was precluded from raising the defense of entrapment by his failure to respond to the State's discovery motion pursuant to State procedural rules, and said same trial counsel, who was also initial counsel on the direct appeal, failed to raise and preserve on appeal the errors involved in failure to raise the defense of entrapment or to request instructions thereon.

A. This court should grant Certiorari in order to re-examine the minimum due process standards applicable to determining the minimum caliber of professional legal representation which the Constitution requires the States to assure defendants in criminal trials.

B. The question whether a federal constitutional right was waived is itself a federal question, such that this Court must look beyond the conclusions of the State Appellate Court that certain such issues were waived for failure to be raised below or on the initial direct appeal. Alternatively, if such ordinarily would constitute waiver, this doctrine cannot constitutionally be applied in the face of serious and substantial allegations attacking the competency and effectiveness of counsel, where the grounds for attacking counsel's competency include his failure to have taken various appropriate actions before and at trial, and the alleged waiver of numerous issues on appeal (per the appellate court) is due to that same counsel's failure to raise on appeal issues which he did not choose to raise or was precluded from raising below because of such counsel's lapses in certain State procedural requirements.

C. Additionally, petitioners were denied meaningful appellate review and due process of law, where the appellate court refused to consider, on the petition for rehearing prepared by counsel different from petitioner's trial and original appellate counsel, all points not raised below or on the original direct appeal, even though new counsel on rehearing argued that former counsel, in failing so to do, was thereby ineffective, depriving petitioners of their constitutional right to effective assistance of counsel.

Petitioners' retained trial counsel [2] was precluded from presenting any witnesses other than petitioners, and was precluded from presenting the defense of entrapment as such, as a result of sanctions imposed by the trial court due to counsel's failure to answer the State's discovery motion as to defenses to be raised. (Tr. 123) [3] On appeal, the same counsel attempted to raise the defense of entrapment—that it should have prevented conviction—but the appellate court ruled that failure to have raised said defense below amounted to waiver on appeal. (App. A, p. App. 3)

On petition for rehearing filed by present counsel, although ineffective assistance of counsel both at trial and on appeal was presented, the court refused even to discuss this constitutional issue. (App. B)

[2] Clearly, the same constitutional standards must apply in ascertaining the effectiveness of both retained and appointed counsel. *Wilson* v. *Phend*, 417 F.2d 1197 (7 Cir. 1969); *Goodwin* v. *Cardwell*, 432 F.2d 521 (6 Cir. 1970); *Lee* v. *Hopper*, 499 F.2d 456 (5 Cir. 1974); *Moore* v. *United States*, 432 F.2d 730, 736-37 (3 Cir. 1970); *United States* v. *Marshall*, 488 F.2d 1169, 1192-93 (9 Cir. 1973).

[3] Other instances (aside from the entrapment question and the sanctions for non-compliance with discovery) wherein counsel's performance fell far below recognized standards of professional competence—both of which were raised and presented to the appellate court on petition for rehearing and to the State Supreme Court on petition for leave to appeal—are as follows: allowing damaging hearsay to come in without objection and without cautionary instructions limiting its purpose; and failure to object to prejudicial prosecution argument. It was also argued in the petitions for rehearing and for leave to appeal that the errors thus countenanced by former counsel deprived petitioners of a constitutionally fair trial.

In Points 2 & 3, *infra*, petitioners demonstrate that the defense of entrapment was an available and viable defense on the facts at bar.

Prior counsel's failure to raise or to be able to raise entrapment below—which was held to constitute waiver on appeal—together with the other demonstrated areas wherein his performance fell far below minimum professional standards, when considered as a whole,[4] amounts to denial of effective assistance of counsel.

Mr. Chief Justice Burger, when sitting on the Court of Appeals for the District of Columbia Circuit, commented that reversal may be "grounded on ineffective assistance of counsel for failing to press an essential or central element of defense." *Clark* v. *United States*, 259 F.2d 184, 187 (D.C. Cir. 1958) (dissenting opinion). Clearly, conduct of counsel is incompetent if it has in effect "blotted out the essence of a substantial defense" at trial or on appeal. *Bruce* v. *United States*, 379 F.2d 113, 116-17 (D.C. Cir. 1967); *accord*, *Scott* v. *United States*, 427 F.2d 609, 610 (D.C. Cir. 1970). A defendant is denied effective assistance of counsel if "Potentially exonerating defenses were not explored by counsel and were not developed at trial." *Beasley* v. *United States*, 491 F.2d 687, 696 (6 Cir. 1974).

The formerly applied standard—requiring that a defendant demonstrate that his trial was reduced to a farce, sham or mockery before he can prevail on a claim of constitutionally ineffective assistance of counsel—has increasingly been rejected by the more well-reasoned and enlight-

[4] On a claim of ineffective assistance of counsel, the totality of the alleged omissions and errors of counsel must be considered as a whole. See *United States* v. *Hammonds*, 425 F.2d 597, 604 (D.C. Cir. 1970); *Wilson* v. *Phend*, *supra* note 2, at 1199.

ened opinions. See, *e.g.*, cases rejecting old test and substituting therefor such tests as: "legal assistance which meets a minimum standard of professional representation." *United States ex rel Williams* v. *Twomey*, 510 F.2d 634, 641 (7 Cir. 1975); *West* v. *Louisiana*, 478 F.2d 1026 (5 Cir. 1973); *Bruce* v. *United States, supra; Beasley* v. *United States, supra.* In *Beasley*, the court formulated the more liberal standard as follows:

> "We hold that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. *It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. . . .* [citations omitted; emphasis added.] Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest. . . . *Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner. . . .* Defense strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent deny a defendant the effective assistance of counsel, if some other action would have better protected a defendant and was reasonably foreseeable as such before trial." *Id.* at 696 (Emphasis added.)[5]

Due to the serious problems posed to the administration of criminal justice by allegations of incompetent counsel, it is essential that this Court set down some ground rules for the State and federal courts to follow in dealing with due process claims both of State and federal prisoners.

[5] See Chief Justice Burger's article, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice*, 42 FORDHAM L. REV. 227 (1973).

Indeed, one Court of Appeals has invited resolution of this sticky problem by this Court:

> "The Supreme Court, however, has never enunciated any clear standards for courts to follow in passing on claims of ineffective assistance of counsel. As a result, circuit courts, left without guidance, have groped for the correct prescription to apply." *McQueen* v. *Swenson*, 498 F.2d 207, 215 (8 Cir. 1974).[6]

To hold, as does the appellate court, that all matters not raised below (including the entrapment defense) are waived on appeal despite the unresolved serious allegations of ineffective counsel for failure to raise them, is to condone that which the cases agree violates whatever standard of effective assistance of counsel may be applicable: *i.e.*, the blotting out of a substantial defense by counsel's ineptitude.

Due process cannot countenance a finding of waiver in these circumstances.

The State procedural grounds utilized by the trial and reviewing courts herein to preclude petitioners from effective reliance on the defense of entrapment surely do not bar this Court from considering the merits of their substantial contentions.

> "[This Court has] consistently held that the question of when and how defaults in compliance with State procedural rules can preclude our consideration of a federal question is itself a federal question." *Henry* v. *Mississippi*, 379 U.S. 443, 447 (1965).

[6] See *McQueen* v. *Swenson*, *id.* at 214-17, collecting recent cases from various Circuits utilizing more liberal formulations than the "farce-mockery" test.

Indeed, counsel's failure to raise the entrapment defense because of his own dereliction in failing to comply with required discovery orders virtually amounts to a "cover-up" by that same counsel on appeal to keep from exposing his own serious lapses at trial.

To delineate the minimum standards of professional competence expected of counsel defending persons accused of crime, this Court should accept the invitation of the Eighth Circuit to enunciate appropriate standards. Where the courts themselves decry the lack of standards, this Court should not hesitate to act. Certiorari should therefore be allowed.

2.

Entrapment was an available defense. The doctrine set forth by this Court in Hampton v. United States, ... U.S. ....., 48 L.Ed.2d 113 (1976), does not preclude a finding of entrapment as a matter of law in all situations where a government agent supplied the contraband, subject of petitioners' convictions. The holding in that case was based upon a combination of that factor plus a showing of predisposition of defendants to commit such offenses. Certiorari should be allowed to clarify the extent (if any) to which Hampton modified existing law on entrapment.

The Appellate Court held that entrapment was not raised below and thus that it could not be argued on appeal. (App. A, p. App. 3) Moreover, in the supplemental opinion upon denial of rehearing, the court further indicated that the defense of entrapment was not available because in *Hampton* v. *United States*, ... U.S. ....., 48 L.Ed.2d 113 (1976), the Court ruled that the fact that a government agent supplied the contraband did not per se amount to entrapment, thus overruling a contrary rule previously applicable in Illinois. (App. B, p. App. 11)

But *Hampton* does not so hold. Rather, it holds that where the defendant is shown to be predisposed to commit the offense, the mere fact that the government supplied the contraband does not in itself preclude conviction, either on entrapment or on due process grounds.

To the extent that the Illinois courts as reflected in the case at bar are misconstruing *Hampton* so as to deprive a defendant who is *not* so predisposed of the entrapment defense, certiorari should be allowed so that *Hampton* may be clarified and not used as a sword against non-predisposed defendants. (At bar, of course, there was no evidence that petitioners were predisposed to commit any drug offenses.)

And since *Hampton* does not so hold, the defense of entrapment *was* available to petitioners herein upon the facts at bar. As such, their original attorney's acts and omissions which precluded such defense from being raised at trial or considered on appeal resulted in substantial prejudice to their due process right to a fair trial.

3.

The defense of entrapment may be raised as an alternative to the defense of no guilty scienter. State decisional law precluding same deprives petitioners of their right to present a meaningful defense, in violation of due process of law.

In direct opposition to a State statute permitting inconsistent defenses,[7] and contrary to the reasoning of *United States* v. *Demma*, 523 F.2d 981 (9 Cir. 1975), the appellate court approved the trial court's failure to instruct on en-

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[7] See committee comments to Supreme Court Rule 413(d), Chap. 110A, Ill. Rev. Stat. 1975.

trapment, holding that petitioners could not avail themselves of this defense unless they admitted committing the acts charged. (App. A, pp. App. 10-11) Since petitioners alternatively claimed that they did not realize what they were getting involved with until it was too late, the appellate court held the defense of entrapment in any event unavailable. (App. A, pp. App. 10-11)

We submit that the reasoning of *Demma,* rejected by the Illinois courts, is not only persuasive but, indeed, is mandated by due process of law. Even if the entrapment defense itself is not so mandated, once a State sees fit to recognize it, it must rationally be applied and not withheld on a whim. Upon the facts at bar, the jury could reasonably have found either that petitioners had no culpable mens rea or scienter in that they did not embark upon the venture with knowledge of what was involved; or, in the alternative, that if they did know, they were entrapped. The state decisional law in this case to the contrary effectively deprives petitioners of their right to present a meaningful defense. *Cf. Washington* v. *Texas,* 388 U.S. 14 (1967); *Holt* v. *Virginia,* 381 U.S. 131 (1965); *Chambers* v. *Mississippi,* 410 U.S. 284 (1973).[8]

The availability of the defense of entrapment ought not depend upon the application of local procedures and decisional law. Certiorari should be allowed to clarify its availability in State criminal proceedings.

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[8] Moreover, the court's ruling imposing the drastic sanction of precluding the entrapment defense in response to original counsel's failure to inform the State of possible defenses arguably operates to deprive petitioners of a constitutionally fair trial for the additional reason that such ruling, based on counsel's lapse, by precluding the only complete defense, deprived petitioners of due process of law. See pp. 13-15, *supra.*

And finally, since entrapment should be held to have been a viable defense at bar, counsel's failure properly to raise or preserve the issue was prejudicial to petitioners and contributed to their being deprived of a trial which was constitutionally fair, as required by due process of law.

CONCLUSION

For the foregoing reasons, certiorari should be allowed to review the decision of the Illinois Appellate Court.

Respectfully submitted,

JULIUS LUCIUS ECHELES
CAROLYN JAFFE
Attorneys for Petitioners

APPENDIX

APPENDIX A

#75-11 and 74-431 (Consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

JOHN HESLER and JOHN SELZER,
Defendants-Appellants.

Appeal from the 19th Judicial Circuit,
Lake County, Illinois.

(Filed March 31, 1976)

MR. PRESIDING JUSTICE GUILD delivered the opinion of the court:

The defendants herein were jointly tried for the unlawful possession and unlawful delivery of more than 500 grams of Cannabis. Defendant Selzer was found guilty of both charges and was sentenced to 3-15 years. Defendant Hesler was found guilty of unlawful delivery only and sentenced to 1-4 years in the penitentiary.

On the night of March 15, 1974 one Rich Roman, described as an agent of the Lake County Sheriff's Department by both the State and the defense, set up a sale of marijuana between John Hesler and John Selzer and two sheriff's deputies of Lake County. The sale took place in Griff's Tavern parking lot in Lake County. Hesler drove to the scene in his car accompanied by one Joe Gray. Rich Roman drove his vehicle to the scene accompanied by John Selzer and the marijuana was in the trunk of Roman's car. The four men exited their vehicles and, at the request of John Hesler, the detectives displayed the money for the purchase in the sum of $6,750 to John Hesler who counted it. The marijuana was then examined by the detectives and the money handed to John Hesler. All four of the men were then arrested by the detectives. At the time of arrest John Hesler was armed with a .32 or .38 caliber pistol in his boot.

There is no dispute as to the above testimony. However, John Selzer and John Hesler testified in their own behalf. In substance their testimony was that John Hesler was approached by Joe Gray and asked if he would like to make $50. Gray told Hesler that a friend of Gray's, Rich Roman, had purportedly said he was going to collect a lot of money and he wanted some other people with him. Hesler then asked if John Selzer could come along with them. They were subsequently called and met with Gray and Roman and their testimony is that it was not until then that they discovered that this was to be a sale of marijuana. They denied that they had any part in the sale of the marijuana but merely went along with Rich Roman and Joe Gray.

The first contention of the defendants is that they were entrapped. In support of this contention defendants have cited *People* v. *Keating* (1971), 2 Ill. App. 3d 884, 889, 270 N.E.2d 164, 169:

> "The nefarious business of the sale of narcotics is not a game governed by the rules of gentlemanly conduct and fair play."

Defendants contend the nefarious activity herein was on the part of the Sheriff's office and its agents. This issue was not raised in the trial court and the statement of the Supreme Court, in the case of *People* v. *Fleming* (1971), 50 Ill.2d 141, 144, 277 N.E.2d 872, 874, applies specifically to the facts before us:

> "The defense of entrapment, of course, may not be raised for the first time on appeal. [Citation.] The failure to raise the question in the trial court will be regarded as a waiver of it. To avoid this consequence the defendant in a familiar argument says that the question was not raised because of his trial counsel's incompetence. Fatally embarrassing to this position, however, is the logically required rule that one may not at once deny the commission of the offense and claim entrapment. [Citations.]"

We find that this contention was waived.

The defendants' next contention is that they were not proven guilty beyond a reasonable doubt. They argue that the evidence was that they were not in possession of the marijuana but rather that the ten bags of marijuana were in the possession of Rich Roman, the agent of the Sheriff's deputies, in his car. Defendants testified that they did not know that this was to be a sale of marijuana until they were on their way to the meeting with the purchasers. Defendant Selzer testified that he went along as "we were supposed to protect him," for which each defendant was to get $50. In *People* v. *Embry* (1960), 20 Ill.2d 331, 169 N.E.2d 767, the Supreme Court, in passing on the question of possession of drugs, cited *People* v. *Wheeler* (1955), 5 Ill. 2d 474, 126 N.E.2d 228, where the question was whether the

defendant was in exclusive possession of stolen goods and the court therein held that the rule that possesion must be exclusive does not mean that the possession may not be joint. The court stated:

> "This question has never been squarely presented to us in a case involving possession of narcotics, but courts of other jurisdictions have held that possession of narcotics may be joint. [Citations.] We are of the opinion that these cases express a sound rule. To hold otherwise would permit two or more persons to gain immunity from prosecution on a charge of unlawful possession of narcotics by proving joint possession of drugs. Such a result would be contrary to reason and would defeat the purpose of the Uniform Narcotic Drug Act." 20 Ill.2d at 335-36, 169 N.E.2d at 769.

The argument of the defendants is that the agent of the Sheriff's deputies set up the transaction and furnished the marijuana for which the sum of $6,750 was paid to one of the two defendants. It is obvious that the jury did not believe these statements of the defendants. *See People* v. *Meaderds* (1961), 21 Ill.2d 145, 148, 171 N.E.2d 638, 639-40, where the court stated:

> "It is next urged that the proof fails to establish defendant's guilt beyond reasonable doubt, the entire sweep of the argument being that the testimony of Peavey is the most reasonable and logical and that it should be accepted over that of the arresting officers. . . . We find nothing in the record which shows either injustice or error on the part of the trial court in accepting the version of the police officers as true."

In the case before us the jury obviously accepted the version of the arresting officers and we will not substitute our judgment for that of the jury in such a situation. In further support of this argument the defendants have objected to an instruction dealing with constructive possession, however, the defendants have failed to include all of the instructions given. The courts of Illinois have consistently held that if the abstract does not contain all of the instructions, both those given and refused, a claim of error based on the giving or refusal of the instruction will not be heard. (*See People* v. *Dailey* (1968), 41 Ill.2d 116, 121, 242 N.E.2d 170, 173; *People* v. *Williams* (1968), 40 Ill. 2d 522, 530, 240 N.E.2d 645, 650; *People* v. *Pruitt* (1974), 16 Ill.App.3d 930, 942, 307 N.E.2d 142, 153.) Nonetheless, we find that the giving of the instruction was proper as to constructive possession as set forth above.

The next issue raised by the defendants is that they were unduly restricted by the trial court in the examination of officer Winans as to the prior arrest and record of Rich Roman which led to his acting as an agent and informant for the Sheriff's department. The alleged purpose of this cross-examination by the defendants was to discredit the testimony of the arresting officer, Winans. This issue was not raised in post-trial motions of the defendants and the courts of Illinois have repeatedly held that where an issue is not presented to the trial court in a post-trial motion for its decision, it may not be raised for the first time upon appeal. In *People* v. *Pickett* (1973), 54 Ill.2d 280, 282, 296 N.E.2d 856, 857-58, the Supreme Court summarized the rule relating to waiver of an issue by failure to raise the same in a post-trial motion or motion for a new trial. The court in that case also considered the question of plain error under Rule 615(a) (Ill.Rev.Stat. 1971, ch. 110A, §615(a)). (*See also, People* v. *Howell* (1975), 60 Ill.2d 117, 120, 324 N.E.2d 403, 404-05.) In the case before us we find no reason to apply the plain error rule of 615(a). The trial court refused to allow cross-examination of Officer Winans regarding the first arrest of Rich Roman on the ground that it was a collateral issue. The trial court further advised counsel for the defendants that he could prove

the matter by the court record relating to the first arrest of Rich Roman. The defendants did just that and introduced the record of the arrest of Rich Roman and the subsequent dismissal of the cause by the introduction of the record itself through the Circuit Clerk of Lake County. Thus, the fact that Rich Roman had been arrested and the case subsequently dismissed was before the jury, which the jury could consider in reaching their verdict. Additionally, the defendant called the Assistant State's Attorney who had handled the first Rich Roman case who testified as to his conversations with Officer Winans relative to that case and stated:

> "I asked him how information Mr. Roman was giving him was developing. He said he was cooperating and the information was very good, and based on that I made the determination to nolle prosse the case of Mr. Roman."

It can thus be seen that the jury was adequately informed that Officer Winans was using Rich Roman as an informant, and that the original case against him had been nolle prossed at the request of Winans. This was all before the jury for their consideration. We thus find that no error was committed as defendants properly showed the status of the agent Roman.

The next contention of the defendants is that the failure of the State to call the informant Rich Roman as a witness denied the defendants a fair trial and deprived them of their Sixth Amendment rights of confrontation and cross-examination. Once again we point out that this issue was not raised in the post-trial motion and is, therefore, waived in this appeal. Furthermore, we find that the failure of the State to call the informant was not plain error under Rule 615(a) as set forth above. Nonetheless, we do observe several factors relative to this issue. The informant

and Joe Gray were personally known to the defendants and could have been called by them had they so desired. There is no duty on the State to call an informant, known or unknown to the defendants, as a witness. (*People* v. *Mason* (1963), 28 Ill.2d 396, 399, 192 N.E.2d 835, 837; *People* v. *Aldridge* (1960), 19 Ill.2d 176, 180, 166 N.E.2d 563, 565; *People* v. *Izzo* (1958), 14 Ill.2d 203, 213, 151 N.E. 2d 329, 336.) The failure of the State to call either Joe Gray or Rich Roman was pointed out to the jury in detail by defense counsel at trial. It is obvious that the defendants did not wish to call either Rich Roman or Joe Gray as a witness or to make either of them a witness by the court. As counsel for the defendants has stated in his post-trial argument:

> "To suggest that I call Mr. Rich Roman as my witness is the ultimate in absurdities."

Furthermore, in commenting upon the failure of the State to call an informant the appellate court, in *People* v. *Aprile* (1973), 15 Ill. App.3d 327, 332, 304 N.E.2d 169, 173, stated:

> "Finally, defendant argues that the State failed to make available the whereabouts of a named person or otherwise make him available to the defense and that such failure deprived him of a fair trial particularly as it related to the defense of entrapment. It is defendant's argument that this person was an informer, in the employ of the Illinois Bureau of Investigation, and the person who 'set him up' for the sale of the non-narcotic substance to an agent of the Bureau. The State proved its case without him and no duty we can see devolved on the State to call him as a witness or have him otherwise available."

We therefore find that, while the issue was not raised in post-trial motion, that because the State was able to prove its case without the testimony of Rich Roman or Joe Gray

it was under no duty to call them as witnesses and that the failure to call either of them, both known to the defendants, was not error.

The last contention of the defendants is that the sentence imposed is excessive. In the absence of abuse of discretion in sentencing, this court will not reduce the sentences imposed by the trial court. As the State points out, defendant Hesler advised the deputy sheriffs that he could produce 75 pounds of marijuana for them by Monday and further advised the deputies that if they wished to purchase marijuana in 100 pound lots they could reduce the price. Under the circumstances and facts of this case we do not find that the sentences imposed were excessive.

In summation, in looking at the record as a whole, and in light of our function on review of determining only the question of whether there is sufficient credible evidence to prove the accused's guilt beyond a reasonable doubt and the jury's function to determine the credibility of the witnesses and the weight to afford their testimony, we find there was such sufficient credible evidence presented from which the jury could conclude that defendants were proven guilty beyond reasonable doubt. The jury obviously has rejected the explanation by which the defendants attempt to explain their knowledge and possession of marijuana and has accepted the State's evidence as true. (*People* v. *Ward* (1975), 31 Ill.App.3d 1022, 1026, 335 N.E.2d 57, 60.) From our examination of the record as a whole it is our opinion there is ample evidence, both credible and legally sufficient, to establish the guilt of the defendants beyond reasonable doubt.

AFFIRMED.

SEIDENFELD and HALLETT, JJ., concur.

APPENDIX B

74-431)
NO. 75-111) Cons.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

JOHN HESLER and JOHN SELZER,
Defendants-Appellants.

Appeal from the 19th Judicial Circuit,
Lake County, Illinois.
(Filed July 22, 1976)

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

MR. PRESIDING JUSTICE GUILD delivered the supplemental opinion of the court: We have considered defendants' petition for rehearing in this case on the issue of whether the defense of entrapment was waived at trial. Relying in part on *People* v. *Strong* (1961), 21 Ill.2d 320, 172 N.E.2d 765, defendants argue that since evidence of entrapment was presented at trial and since the theory of entrapment was argued to the jury, the issue of entrapment was preserved for review.

In *People* v. *Strong*, the Supreme Court stated:

> "The People insist that the defense of entrapment was not raised during the trial and cannot therefore be

raised on appeal. This argument is not well taken, because facts suggesting entrapment were presented *in detail* and defense counsel raised the point in his closing argument. Entrapment need not be specially pleaded or relied upon exclusively so long as it has been *clearly suggested* in the trial court. cf. *People* v. *Van Scoyr,* 20 Ill.2d 233; *People* v. *Outten,* 13 Ill.2d 21." [Emphasis added.] 21 Ill.2d at 324, 172 N.E.2d at 767.

In the instant case, we find that the defense did present evidence that defendants were solicited by Rich Roman to help him in his endeavor and that neither of the defendants had any knowledge that a marijuana sale was involved. We further find that defense counsel argued to the jury that the marijuana belonged to Rich Roman and that his clients were innocent persons "shanghaied" to come along and kept at the scene of the sale by threat. However, we find that this is not a presentation of facts *in detail* which *clearly suggests* entrapment as a defense. In fact, trial defendants' defense was structured upon establishing insufficiency of the evidence to prove possession and delivery, and not once was the word "entrapment" even mentioned. We, therefore, adhere to our original opinion that defendants had waived the issue of entrapment by failing to raise it at trial.

In addition, attention is directed to our statement in the original opinion that, "[Defendants] denied that they had any part in the sale of the marijuana. . . ." In view of this, and in view of defendants' trial defense, we further note the principle that the defense of entrapment is incompatible with the denial of the commission of the acts constituting the offense. (*People* v. *Realmo* (1963), 28 Ill.2d 510, 192 N.E.2d 918.) Thus, by denying that they had committed the offense, the defendants were thereby precluded from raising entrapment as a defense. We recognize that this view is in conflict with the 9th Circuit Court of Appeals decision of *U.S.* v. *Demma* (9th Cir., 1975) 523 F.2d 981. However, that opinion is not binding upon this court, and even if we desired to follow it, which we do not, since we find its reasoning unpersuasive, we would be unable to do so in view of the binding precedent of the highest court of this state to the contrary. *See e.g., People* v. *Fleming* (1971), 50 Ill.2d 141, 277 N.E.2d 872.

Furthermore, we observe that the holding of the court in *People* v. *Strong, supra,*—that a conviction for sale of narcotics may not stand when the narcotics are supplied by a government informer—has been overruled by the recent United States Supreme Court opinion of *Hampton* v. *United States* (1976), ... U.S. ....., 48 L.Ed.2d 113, 96 S.Ct. ....., which held that a conviction is not precluded, on entrapment grounds, by the fact that a government informant supplied the contraband which defendant then sold.

Defendants also argue that they were not proven guilty beyond a reasonable doubt, due in part to the State's failure to rebut the affirmative defense of entrapment. Our decision to adhere to our holding that defendants waived the issue of entrapment obviates the necessity of reconsidering this issue.

The remaining issues presented in defendants' petition for rehearing, which was prepared by counsel different than the one who represented defendants at trial and on appeal, are not properly before this court as they raise issues which were not argued in defendants' initial appellate brief. *See,* Ill.Rev.Stat. 1975, ch. 110A, ¶341(e)(7).

Accordingly, for the reasons stated in the original opinion, and in this supplemental opinion, we deny the petition for rehearing. The judgments appealed from are affirmed.

AFFIRMED.

SEIDENFELD and HALLETT, JJ., concur.

APPENDIX C

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT

Springfield 62706

September 29, 1976

Mr. Julius Lucius Echeles
Attorney at Law
35 East Wacker Drive
Chicago, Ill. 60601

No. 48783 — People State of Illinois, respondent, v. John Hesler, et al., petitioners. Leave to appeal, Appellate Court, Second District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ *Clell L. Woods*
Clerk of the Supreme Court